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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO GONZALES TAFOLLA, Defendant and Appellant.	C059642 (Super. Ct. No. CM027444)

Convicted of murdering Myndee Rosado, defendant appeals. He contends the trial court committed instructional error, his trial counsel was constitutionally deficient, and the court erred in denying his postconviction motion for new trial and a new attorney. We conclude that the trial court failed to address adequately defendant's postconviction request for new counsel. We therefore remand for a hearing on that issue. Other than that, defendant's contentions do not establish prejudicial error.

FACTS

All events in this summary of the facts took place in 2007.

Tancreto and the Car

From March to May, Michael Tancreto dated Myndee Rosado. On May 4 or 5 Trancreto drove his Nissan Altima to the home of Pamela Sanders, Rosado's friend, in Orland and stayed there with Rosado until May 7. On that day, they drove together to another friend's house in Red Bluff. Rosado dropped off Tancreto and left in his car, saying that she had a court date and would be back in an hour or so. Rosado did not return that day, and Tancreto's attempts to locate her were unsuccessful. He never saw her again.

Witnesses See Defendant and Victim Together

In May, defendant lived with his sister, brother-in-law, and mother in Orland. On Saturday, May 19, defendant and his brother-in-law, Alfredo Castellano, went to a liquor store for beer. While there, they met Rosado and Sanders, who had been next door to the liquor store doing laundry. Defendant spoke to Rosado briefly, and they agreed to meet at the county fair that evening. After Castellano and defendant left, Rosado asked Sanders to go to the county fair with her.

Defendant and Castellano returned home from the liquor store, then went to the county fair. Defendant met up with Rosado. Later that evening, Castellano drove defendant to get a 12-pack of beer and dropped defendant off at Sanders's residence. Defendant returned home sometime between 3:30 and

6:00 the next morning, Sunday, May 20. (Sanders testified that defendant left the fair with her and Rosado in Tancreto's car, and went to Sanders's residence.) It appears, from defendant's statements to a detective, that Rosado and defendant returned to the fair, but Rosado did not wait for defendant. That is when defendant found Castellano and got a ride back to Sanders's residence, where he again met up with Rosado.

At Sanders's residence, defendant discussed tattoos with Rosado. He showed her a booklet about tattoos from his backpack. Defendant and Rosado eventually left Sanders's residence together in Tancreto's car at about 11 p.m. on Saturday, May 19. No witness reported seeing Rosado alive after that time.

Tancreto's Car

On Sunday, May 20, at about seven in the morning, Tancreto's car was found burning in a field about 300 to 400 yards from defendant's residence. The burnt condition of the car prevented extraction of any physical evidence from it.

Ord Ferry Ranch

Also on Sunday morning, May 20, a worker discovered evidence of a crime at Ord Ferry Ranch, owned by a corporation that employed defendant. Defendant's supervisor, Luis Gomez, went to the Ord Ferry Ranch that morning. He discovered blood on one of the pruning towers (a piece of equipment with wheels and a basket). The pruning tower was near a mobile home on the property. Gomez also discovered a backpack with adult and tattoo magazines and a makeshift tattoo machine inside. Near

the backpack were some sandals, a bathing suit, women's underwear, and a pink blanket. Gomez identified a backpack and tattoo machine later seized in a search of defendant's bedroom as the backpack and tattoo machine he saw at Ord Ferry Ranch.

Gomez reported what he found to his supervisor, and the supervisor instructed him not to touch anything. Gomez left but returned that afternoon. Except for the blood, the items he saw that morning were no longer where he had seen them. He found the pink blanket inside the mobile home and the sandals on the side of the mobile home, but the other items were gone.

On Sunday morning or early afternoon, defendant borrowed Castellano's car and left the house. He was gone for about 40 to 45 minutes before he returned and joined in a family barbecue without saying where he went.

Later, Gomez discovered a Casio watch near the entrance to Ord Ferry Ranch. DNA found on the watch was inconclusive and may have matched the DNA of both defendant and Rosado except that the DNA found on the inside of the watch was not from defendant. A receipt for a Casio watch, dated May 21, the day after the discovery of the blood at Ord Ferry Ranch, was found in the search of defendant's bedroom. And, in questioning after defendant's arrest, defendant said that he bought a new watch to replace one he had lost at the fair.

The blood at the Ord Ferry Ranch was Rosado's. A partial palm or finger print taken from the pruning tower could be matched to neither defendant nor Rosado.

On April 24, about a month before the killing, a deputy of the Glenn County Sheriff's Department made a traffic stop involving defendant. In connection with that stop, the deputy searched the car and examined defendant's backpack, which had adult and tattoo magazines and a makeshift tattoo machine inside.

When the deputy who had stopped defendant heard the description of the backpack seen at the Ord Ferry Ranch, he remembered defendant's backpack and reported the match to a detective working on the case.

The Victim's Body Found

On May 22, a ditch tender with the Glenn County Irrigation District found the unclothed body of Rosado in one of the canals. The location of the body was 27.8 miles from the Ord Ferry Ranch.

An autopsy revealed 13 stab wounds to her neck, torso and upper arm. The most serious wounds penetrated the chest cavity. Rosado was alive when all wounds were inflicted. In addition to the other 13 stab wounds, Rosado had defensive wounds on her hands. Scratches on her back, but not on her legs, indicated that she was dragged by the legs before and after she died.

The number and placement of the wounds indicated that it took between five and fifteen or more minutes to inflict the wounds.

Rosado had methamphetamine, cocaine, and marijuana in her system when she died.

The cause of death was by stabbing.

On May 25, the body was identified as Rosado's.

Search of Defendant's Bedroom

On May 27, the Glenn County Sheriff's Department obtained a search warrant for defendant's residence. During the search, defendant's bedroom was identified and searched. Defendant's backpack was found, containing adult and tattoo magazines, ink, and a needle with tape wrapped around it, as well as other items. Two knives were found in defendant's bedroom -- a red Swiss Army knife and another knife that was broken.

Defendant's Statements

On May 28, Detective Greg Felton of the Glenn County Sheriff's Department interviewed defendant, with the Spanish-language assistance of Sergeant Jose Gonzalez of the Shasta County Sheriff's Department. The questioning lasted about four hours, during which defendant admitted lying several times.

At the beginning of the questioning, defendant denied knowledge of or ever having been in the Nissan Altima that was found near his residence. He claimed that he had not been to the Ord Ferry Ranch since two weeks before the interview.

Defendant then acknowledged that he had been with Rosado the evening of May 19. She was with a tall, skinny man with blonde hair. All three went to defendant's residence, where he picked up his backpack, then to the Ord Ferry Ranch. The other man left the car while defendant engaged in a sex act with Rosado. Rosado and the other man then dropped defendant off at his residence.

Over the course of the interview, defendant's story changed. He no longer mentioned the tall, skinny man with blonde hair, but said that he and Rosado went to Sanders's residence. They drank beer and smoked marijuana, and they discussed him giving her a tattoo and having sex. Defendant and Rosado returned to the fair, and defendant had Castellano take him home to get his backpack with the tattoo machine and back to Sanders's residence. From Sanders's residence, defendant and Rosado went to the Ord Ferry Ranch, where they engaged in sex acts, both inside the car and outside the car, near the pruning tower. Rosado then dropped defendant off at his residence.

Concerning his backpack, defendant first denied that the backpack seen by Gomez at the Ord Ferry Ranch was his. But he later admitted that it was his and that he returned to the ranch on May 20 to retrieve the backpack. He saw the blood identified as Rosado's, but claimed to believe it was from a hunter killing a deer. And he denied that he harmed Rosado.

At the beginning of the interview, defendant said that he remembered everything from the night in question, but later, when he was confronted with the inconsistencies in his versions of the events, he claimed that he could not remember because he was "under the influence" or "drugged out."

Defense

Defendant's principal defense was that he did not kill Rosado. In the alternative, he argued that the murder was in the second degree, not the first degree.

PROCEDURE

The district attorney filed an information charging defendant with the murder of Rosado. (Pen. Code, § 187, subd. (a).) The prosecution argued to a jury that the murder was in the first degree because (1) it was premeditated and deliberate (2) it was committed by torture. The jury found defendant guilty of first degree murder.

The probation report prepared for sentencing stated that defendant was convicted of stabbing and murdering a prostitute in Mexico. However, the trial court concluded the conviction was inadmissible at trial because the conviction may have been set aside by the Mexican Supreme Court. The court also did not consider the prior conviction in imposing the sentence in this case.

The trial court imposed the term of 25 years to life in state prison.

DISCUSSION

I

Jury Instruction Concerning Defendants' Statements

Defendant contends that the trial court prejudicially erred by instructing the jury to view defendant's pretrial statements with caution. We conclude that, even assuming error, the error was not prejudicial.

The jury was instructed with the following version of CALCRIM No. 358:

"You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or

not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give such statements."

Defendant makes no contention of error in this first paragraph of the instruction. But the trial court also gave the next paragraph, which defendant claims was error:

"You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Defendant's statements to the detectives were recorded, but the jury was not apprised of that fact. References to a "report" or "transcript" in the testimony of the detectives was not sufficient to inform the jury that the statements had been recorded.

Defendant contends the cautionary language in the last sentence of this instruction is erroneous because it tells the jury to view with caution oral statements by the defendant, even those statements that were exculpatory in nature. This contention misquotes the evidence by omitting words. Defendant quotes the instruction as stating that "the jury [] 'must consider . . . defendant's [pre-trial] oral statement[s] . . . with caution.'" (Ellipses in defendant's original.) The omission of some of the words, however, changes the meaning from using caution in considering "*evidence* of a defendant's oral statement" (italics added), as stated in the instruction, to

using caution in considering the credibility of the statement itself, in defendant's version.

Concerning CALJIC No. 2.71,[1] an instruction similar to CALCRIM No. 358, the California Supreme Court has said: "'When evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct the jury that such evidence must be viewed with caution.' [Citation.]" (*People v. Williams* (2008) 43 Cal.4th 584, 639 (*Williams*).) Because the purpose of this cautionary instruction is to help the jury determine whether the statement was actually made, it should not be given if "'the oral admission was tape-recorded and the tape recording was played for the jury.'" (*Ibid;* see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 (*Slaughter*).) An instruction to view a defendant's *admissions* with caution does not raise due process or fair trial concerns because it is limited to inculpatory statements by the defendant. (*Williams, supra,* 43 Cal.4th at

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[1] CALJIC No. 2.71 stated:

"An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.

"You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.

"[Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]"

pp. 639-640; *Slaughter, supra,* 27 Cal.4th at p. 1200.) "'To the extent a statement is exculpatory it is not an admission to be viewed with caution. [Citation.]' [Citation.]" (*Slaughter, supra,* 27 Cal.4th at p. 1200.)

The difference between CALCRIM No. 358, as given here, and CALJIC No. 2.71, is that the latter instructs the jury to view evidence of defendant's "admissions" with caution but the former instructs the jury to view "evidence of a defendant's oral statement[s]" with caution. Admissions are inculpatory evidence, but statements are neutral and could include exculpatory evidence. Therefore, defendant asserts that CALCRIM No. 358 violated his due process rights by instructing the jury to view the exculpatory parts of his statements (for example, that he did not harm Rosado) with caution.

CALCRIM No. 358 focuses the jury on whether the statement was made, not on the credibility of the declarant. (*People v. Williams, supra,* 43 Cal.4th at p. 639.) If there is "evidence that the defendant made oral statements before the trial," the jury "must decide whether or not the defendant made any of these statements, in whole or in part." (CALCRIM No. 358.) In assessing whether the defendant made the statement, the jury "must consider with caution *evidence of a defendant's oral statement* unless it was written or otherwise recorded." (Former CALCRIM No. 358 (2006-2007), italics added.) The instruction does not direct the jury to use caution in assessing the credibility of the defendant, only in assessing the credibility

of *the evidence of the defendant's statements* -- in determining whether the defendant made the statements.

Here, the evidence of defendant's statements came from the detectives who interviewed him. In their arguments, the prosecution and defense did not question whether the statements were made. Instead, they argued concerning which of defendant's statements to believe.

Defendant, however, claims that giving the instruction violated his due process rights. He cites *Cool v. United States* (1972) 409 U.S. 100 [34 L.Ed.2d 335]. In that case, the jury was instructed to ignore defense testimony unless the jury believed beyond a reasonable doubt that the testimony was true. The *Cool* court held that this violated the defendant's due process rights because it was inconsistent with the presumption of innocence. (*Id.* at p. 104.)

We need not determine whether the instruction, as given, violated defendant's due process rights pursuant to *Cool*, because, even if the instructional error was a violation of defendant's federal due process rights, the error was not prejudicial. Since there was no dispute that defendant made the statements attributed to him by the detectives, giving the additional paragraph of the instruction was harmless beyond a reasonable doubt.[2] The credibility of defendant's statements, as

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[2] Defendant weakly suggests, in one sentence, that the reversible-error-per-se standard applies "[t]o the extent the instruction undercut the state's burden of proof . . . ." However, he does not make an argument that this standard

made to the detectives, is a different jury question, not addressed by the instruction.

Defendant contends that the instruction was prejudicial because the trial court "[told the] jurors they must view the statements with caution . . . ." This contention, however, does not accurately describe the instruction, which told the jury to view with caution the "evidence of a defendant's oral statement . . . ."

Accordingly, giving CALCRIM No. 358, including the last paragraph, was not a prejudicial violation of defendant's due process rights.

II

Jury Instruction Concerning Identity

In connection with the corpus delicti rule, the trial court instructed the jury, using CALCRIM No. 359, that it could not convict defendant based on his pretrial statements alone but that that defendant's identity as the perpetrator could be proved by defendant's statements.[3] Defendant contends that

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applies. In any event, this is not the type of structural error to which the reversible-per-se standard applies. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 189].)

[3] CALCRIM No. 359, as given, stated:

"The defendant may not be convicted of any crime based on his out-of-court statement alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed.

"That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

telling the jury that his identity as the killer could be established by his statements alone violated his right to have a jury determine his guilt beyond a reasonable doubt. The contention is without merit because, considered in context, the instruction did not lead the jury to believe that it could convict based on anything less than proof beyond a reasonable doubt.

"On review, we examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.)

The sentence in CALCRIM No. 359 of which defendant complains is as follows: "The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statement alone." The next sentence reads: "You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." Nevertheless, defendant contends: "[O]n the record of this case -- where defendant's

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"The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statement alone.

"You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

statements plainly were insufficient to establish identity beyond a reasonable doubt -- telling the jury it could rely solely on those statements to infer identity abrogated the state's burden of proof beyond a reasonable doubt."

Essentially the same argument has been rejected by the California Supreme Court with respect to the similar CALJIC No. 2.72 instruction, which reads: "'No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. The identity or degree of the crime may be established by a confession or admission.' (CALJIC No. 2.72.)" (*People v. Frye* (1998) 18 Cal.4th 894, 959.) Concerning this instruction, the court stated: "Under this instruction, the jury is informed that a defendant cannot be convicted of a crime unless there is proof as to each element of the offense independent of his extrajudicial confession or admission. Once the prosecution has proved the corpus delicti of murder, however, the prosecution may use evidence of a confession or admission to establish identity. Although the jury was not specifically instructed pursuant to CALJIC No. 2.91, that '[t]he burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged,' nonetheless, the challenged instruction did not relieve the prosecution from proving that defendant committed the charged crimes. It provided only that

the prosecution could rely on extrajudicial admissions to prove identity once the corpus delicti had been established. [Citation.] In light of the parties' steadfast focus on the issue of identity at trial, including the consistent position by the defense that defendant did not kill the [victims] and the extensive evidence presented by the People connecting him to the crimes, we conclude there is no reasonable likelihood the jury would have understood the prosecution had no obligation to prove defendant was the person who committed the offenses." (*People v. Frye*, *supra*, at p. 960.)

Here, the same is true -- there is no reasonable likelihood the jury understood CALCRIM No. 359 to mean that it was unnecessary for the prosecution to prove defendant's identity beyond a reasonable doubt. Indeed, the sentence after the challenged sentence in the instruction reminded the jury that the standard of proof was guilt beyond a reasonable doubt.

Defendant further asserts that, because the instruction relieved the prosecution of proving his identity beyond a reasonable doubt, the instruction violated his Sixth Amendment rights pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]. This further assertion is without merit because we have determined that the instruction did not relieve the prosecution of its burden of proof on that issue.

Accordingly, the jury was instructed properly.

III

Jury Instruction Concerning False

Statements and Suppression of Evidence

The trial court instructed the jury that it could consider defendant's false and misleading statements (CALCRIM No. 362) and suppression of evidence (CALCRIM No. 371) in determining his guilt.[4] Defendant contends that these instructions were given in error because, while the evidence may support an inference that defendant was conscious of having committed a crime, it does not support an inference that the murder was in the first degree. He asserts that the instructions violated his due process rights.

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[4] CALCRIM No. 362, as given, stated:

"If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.

"If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

CALCRIM No. 371, as given, stated:

"If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

Defendant concedes that the California Supreme Court has repeatedly rejected this contention (see, e.g., *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Yeoman* (2003) 31 Cal.4th 93, 131) and that we are bound to follow the high court's precedent (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455). The contention is therefore without merit.

IV

Effective Assistance of Counsel

Defendant contends his Sixth Amendment right to effective assistance of counsel was violated because his trial counsel failed to seek a pinpoint jury instruction relating intoxication to premeditation and deliberation. We conclude that, even if counsel should have requested the instruction, the failure to do so did not prejudice defendant.

A defendant claiming ineffective assistance of counsel bears the burden of showing both that counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's error, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-696 [80 L.Ed.2d 674, 691-699]; *In re Cudjo* (1999) 20 Cal.4th 673, 687.) "'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny [citation]' . . . . [Citation.] 'Although deference is not abdication . . . courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.'"

(*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1335-1336, citing *People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

There was evidence that defendant bought a 12-pack of beer and that he and Rosado drank beer and smoked marijuana at Sanders's house before going to the Ord Ferry Ranch. During his questioning, defendant first stated he remembered everything from the night of the murder but then switched to an opaque posture and claimed that he was under the influence and "drugged out" that night, which prevented him from fully remembering the events.

It is not necessary for the court to examine the performance prong of the test before examining whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. (*Strickland v. Washington, supra,* 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid.*)

Even if we were to find that counsel's performance was deficient because he failed to request an instruction relating intoxication to premeditation and deliberation, it is not reasonably probable that defendant would have obtained a more favorable outcome. (See *Strickland v. Washington, supra,* 466 U.S. at pp. 684-696.) The evidence concerning the manner in which defendant killed Rosado was overwhelming in showing that he did so with premeditation and deliberation. He took Rosado to a secluded spot, stabbed her more than 13 times, all of the wounds inflicted while Rosado was still alive, dragged her away,

disposed of her naked body, and burned the car. These are not the actions of a person so intoxicated that he could not premeditate or deliberate concerning his actions. It is unlikely that the jury would have concluded that the murder was in the second degree if it had been given a pinpoint instruction relating intoxication to premeditation and deliberation.

Furthermore, the trial court gave the standard instructions concerning first degree murder and premeditation and deliberation.

Accordingly, because defendant has not shown prejudice to him from counsel's failure to request a pinpoint instruction relating intoxication to premeditation and deliberation, we need not determine whether counsel's representation was deficient. And we need not determine whether it was a reasonable strategic decision.

V

Jury Unanimity

The trial court instructed the jury on two theories of first degree murder: (1) premeditation and deliberation and (2) murder by torture. The court also instructed: "You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory." Defendant asserts that the trial court violated his Sixth Amendment right to a jury trial by instructing that the jury need not agree on the theory.

Defendant claims that, even though a plurality of the United States Supreme Court has held that the jury need not agree unanimously on the theory of first degree murder, that holding is no longer the law of the land based on a reading of the court's more recent decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556] (*Ring*).

We are nevertheless bound by the decisions of the California Supreme Court stating that the Sixth Amendment does not require jury unanimity on the theory of first degree murder. The court has stated: "As for defendant's claim that a unanimity instruction should have been given, our cases have repeatedly rejected this contention, holding that the jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. [Citations.] [¶] We are not persuaded otherwise by *Apprendi* . . . . There, the United States Supreme Court found a constitutional requirement that any fact that increases the maximum penalty for a crime, other than a prior conviction, must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. [Citation.] We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular theory justifying a finding of first degree murder. [Citation.]" (*People v. Nakahara* (2003) 30 Cal.4th 705, 712-713, italics omitted; see also *People v. Hawthorne* (2009) 46 Cal.4th 67, 89.)

Because we are bound by the decisions of the California Supreme Court, we need not consider defendant's contention further. (*Auto Equity Sales, Inc.* v. *Superior Court, supra,* 57 Cal.2d at p. 455.) It is without merit.

VI

Motion for New Trial and New Attorney

At sentencing, defendant sought a new trial and a new attorney. The trial court denied the motions. We conclude that the trial court erred by not fully considering the motion for a new attorney and that remand for consideration of that motion is necessary. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).)

After the prosecutor and defense counsel had made arguments at the sentencing hearing, defendant asked to speak. He expressed condolences to the victim's family, but he denied involvement in her murder. He claimed that he "met another gentleman that was also in jail and that person knew who was the person that was responsible for this case, for this accident. And that particular person had been the romantic partner of the victim four months before she died."

Defendant continued: "There was another gentleman that -- there was another gentleman that listened to the conversation. He gave me a letter, and I gave that letter to my attorney. And I feel that it was a very important point in this case. Yeah, so that was a very important point, I believe, in my favor. And that's what [*sic*] I am questioning the decision of the jury and appealing actually the judgment of the jury."

Defendant also claimed that he was not allowed to testify. That claim, however, was untrue, as defendant, at the end of the prosecution's case-in-chief, was informed, in open court, of his right to testify. He stated, on the record, that his decision was to decline to testify.

Finally, defendant gave the court a letter. The letter, written for defendant by a fellow inmate, stated:

"Your Honor

"I humbly and respectfully request that you declare a mistrial in this case. I feel that my attorney did not represent me in a competent manner. He never investigated a crucial lead pertaining to the most probable suspect or suspects involved in the murder. I gave him a sighned [*sic*] letter of a witness who knew about the factors involved that lead [*sic*] up to the homicide. I also appeal the decision of the jury. I would like a new trial with a new attorney who will supeana [*sic*] the witnesses that know who did commit this crime. I was a witness on my own behalf and my attorney did not let me testify on my own behalf and deprived me of my constitutional rights. He deprived me of my right to a speedy trial. I wanted my trial right away and he waived my time and post-ponned [*sic*] my trial. He also brought the Mexican Consulate with out [*sic*] my prior knowledge into my case."

The court asked defense counsel if he wanted to comment on the letter, and counsel declined. The court inquired of counsel and resolved the issues of whether it was defendant's decision not to testify and whether defense counsel had brought the

Mexican Consulate into the case without defendant's consent. However, the court did not specifically address defendant's assertion that there was exculpatory evidence that counsel had failed to investigate.

The court concluded the topic with this observation:

"The Court heard the evidence in this case. The evidence against you, [defendant], was overwhelming. There is no question in my mind that you killed the woman brutally and intentionally. The statements you have made in court today are an attempt to escape the punishment which the law requires that I impose. I have taken your statements into account, but your requests are denied."

On appeal, defendant contends that the trial court abused its discretion in denying his request for a new trial based on ineffective assistance of counsel. While we agree that the matter was not properly heard, we conclude that defendant's statements constituted a request for new counsel that should have been resolved as a prelude to a possible motion for new trial.

A claim of ineffectiveness of counsel may be raised in a new trial motion. (*People v. Smith* (1993) 6 Cal.4th 684, 693 (*Smith*).) The defendant must establish "'trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings.' [Citations.]" (*Id.* at p. 691.)

When a defendant makes a *Marsden* motion and a new trial motion based on ineffective assistance of counsel relating to matters that occurred outside the courtroom, the court must resolve the *Marsden* motion first. (*People* v. *Diaz* (1992) 3 Cal.4th 495, 573-574.) "[S]ubstitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (*Smith, supra,* 6 Cal.4th at p. 696.) The decision to appoint new counsel lies in the sound discretion of the trial court and "will not be overturned on appeal absent a clear abuse of that discretion." (*Ibid.*)

Here, it was necessary for the trial court to determine, first, whether defendant was entitled to new counsel to assist in the preparation of a new trial motion. To do so, the trial court should have conducted a *Marsden* hearing. Instead, the court did not inquire into defendant's main reason for requesting new counsel, which was counsel's alleged incompetence. Defendant stated that he gave possibly exculpatory evidence to counsel, but counsel did not follow up

on it. That claim remains unresolved and could possibly support appointment of new counsel to pursue a motion for new trial.

The allegation, alone, that there was someone in jail who had heard that someone else knew about who killed Rosado was insufficient to support an order granting a new trial. That evidence is inherently incredible, if not inadmissible, considering the levels of hearsay. However, if defendant can show that trial counsel failed to follow up on credible information, the trial court may have cause to grant the *Marsden* motion.

The Attorney General argues that we should sustain the trial court's handling of defendant's requests because (1) defendant did not make clear his desire for substitute counsel (see *People v. Richardson* (2009) 171 Cal.App.4th 479, 484) and (2) the court did not abuse its discretion in denying the motion for new trial. First, defendant articulated his desire for new counsel in his letter to the court in which he requested a "a new trial with a new attorney . . . ." And second, the discussion concerning whether a motion for new trial was properly denied is premature. Under the authorities cited, the court must rule on the *Marsden* motion before considering the new trial motion.

We therefore must remand for a *Marsden* hearing.

DISPOSITION

The judgment is reversed and the matter remanded for the court to conduct a postconviction *Marsden* hearing. If the court grants the *Marsden* motion, a new trial motion is filed, and the

new trial motion is granted, defendant shall receive a new trial. If the court denies the *Marsden* motion, or a new trial motion is not filed, or a new trial motion is filed and denied, the court shall reinstate the judgment of conviction and sentence previously imposed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.